No. 75-1400

In the Supreme Court of the United States

OCTOBER TERM, 1975

ALBERT JOHN PENA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. I) is reported at 527 F. 2d 1356. An earlier opinion of the court of appeals, remanding the case to supplement the record (Pet. App. II), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1976 (Pet. App. III). The petition for a writ of certiorari was filed on April 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether extrajudicial statements of a government informant were properly excluded from evidence.

2. Whether petitioner's right to a speedy trial was violated by a delay of seven and one-half months between his first trial and his retrial.

STATEMENT

Following a second jury trial in January 1975,[1] in the United States District Court for the Southern District of Texas, petitioner was convicted of distribution of heroin (Count 1), possession of heroin with intent to distribute (Count 2), and conspiracy to distribute heroin (Count 3), in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner was sentenced to eight years' imprisonment on Count 1, to be followed by three years' special parole. Sentences on the two remaining counts were suspended. The court of appeals affirmed the convictions on Counts 1 and 2, and reversed the conviction on Count 3 (the conspiracy charge) on the ground of insufficiency of the evidence (Pet. App. 22, 34-37).

1. On July 16, 1971, Joaquin Legarreta, a special agent of the Drug Enforcement Administration (D.E.A.), along with John Rubio, an informant for the D.E.A., met petitioner at a bar in Houston, Texas. When Legarreta offered to purchase two ounces of heroin for $1,200, petitioner said he could supply the drug (Tr. 57-58).[2]

Legarreta asked where the heroin was; petitioner made two telephone calls and then told Legarreta that "he could not find Vincente." Petitioner then left to look for Vincente. Approximately ten minutes later, petitioner returned, stating that he had found Vincente and that the latter would be arriving with the heroin (Tr. 58-59). After Vincente Vega arrived, Legarreta asked whether he had brought the heroin; Vega stated he had not. Vega left shortly thereafter, purportedly to get the heroin. When he returned he went directly to the men's restroom (Tr. 60). Petitioner and Legarreta followed (Tr. 61).

[1]Petitioner's first trial had ended in a mistrial in June 1974.

[2]All transcript references are to the appendix filed in the court of appeals.

Legarreta saw Vega place two packages on a shelf inside the restroom and then depart. Petitioner removed the packages from the shelf and handed them to Legarreta, who gave petitioner a package containing $1,200 (Tr. 61-62).

2. Petitioner's defense was that he had been framed by informant Rubio, who mistakenly thought that petitioner was responsible for the death of Rubio's brother-in-law. According to petitioner's version of these events, Rubio had asked petitioner to take a package from Legarreta and hold it for safekeeping. Rubio had said that the package would contain some reward money and that Rubio had no safe place to keep it. Petitioner's testimony was that he never handed the officer a package but merely took the reward money from Legarreta in his capacity as agent for Rubio (Tr. 200), and later gave the money to Rubio (Tr. 202). Petitioner said that he never realized he was participating in a sale of heroin (Tr. 202-203).

At trial, petitioner called Jessie Garcia, a mutual friend of Rubio and petitioner, for the purpose of introducing evidence that, subsequent to the heroin transaction, Rubio had told Garcia of his attempt to get even with petitioner by arranging the heroin transaction. On the grounds that evidence of the conversation constituted inadmissible hearsay,[3] the court refused to allow the jury to hear it. The following proffer was made outside the presence of the jury (Tr. 187-188):

> Q. [By Mr. Bates] Mr. Garcia, as a result of the conversation that you had, what, in effect, did Mr. John Rubio tell you with regard to Albert John Pena and this case?

[3]At the time of trial Rubio could not be located and did not appear as a witness.

A. [By Mr. Garcia] Well, like I said, I ran into him in this restaurant and I asked him about Albert, how he was doing and all this, and he was drinking a beer and having something to eat there, and so was I, and—

Q. (interrupting) Speak up a little so we can hear you.

A. —this other friend of mine, you see, we had stopped by there to eat—I usually stop by there most of the time—and I asked him about Albert, and he told me that he had gotten even with Albert on account of he believed that Albert had killed his brother, or something like this.

Q. How did he get even with Albert?

A. He told me that he had set him up on selling something or other, and that Albert was supposed to pick up some money from some police officer, but that he didn't know that the man that was going to turn him over some money was a police officer.

Q. Okay. And he told you that he had set Albert up?

A. Yes, sir.

Q. That he had, in fact, supplied the heroin that was sold—or, the substance that was sold, and that he got the money from Albert?

A. That—

Q. (interrupting) John Rubio had gotten the money back from Albert, yes.

Q. All right.

MR. BATES: That is, in substance, the conversation, Your Honor.

ARGUMENT

1. Petitioner contends (Pet. 11-17) that the district court erred in refusing to admit the testimony of Garcia regarding his conversation with Rubio. He argues that Fed. R. Evid. 804(b)(3) permits the evidence to be introduced as a declaration by Rubio against his penal interest (Pet. 11-15) and, alternatively, that the court's refusal to admit the conversation violated due process under the rationale of *Chambers* v. *Mississippi*, 410 U.S. 284 (Pet. 15-17).

a. The exception to the hearsay rule for third-party declarations against interest has traditionally been limited to declarations against pecuniary and proprietary interests. *E.g.*, *Donnelly* v. *United States*, 228 U.S. 243, 273-276. This rule has been changed by Fed. R. Evid. 804(b)(3), which makes admissible declarations against penal interests in certain circumstances.[4] Since petitioner's trial occurred on January 20, 1975, however, the Federal Rules of Evidence, which did not take effect until July 1975, were not applicable. Instead, the traditional rule applied,[5] and under that rule the evidence was inadmissible.[6]

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[4]Fed. R. Evid. 804(b)(3) renders admissible a hearsay "statement which * * * so far tended to subject [the declarant] to * * * criminal liability * * * that a reasonable man in his position would not have made the statement unless he believed it to be true." The Rule further provides that "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

[5]Contrary to petitioner's statement (Pet. 11, n. 2), the Fifth Circuit in *United States* v. *Williams*, 447 F. 2d 1285, did not adopt the rule now embodied in Fed. R. Evid. 804(b)(3). *Williams* deals only with the hearsay aspects of expert testimony and does not mention declarations against interest.

[6]If Rubio's statement were admissible as a declaration against interest, it could be only as a declaration against penal interest, since the statement implicated no pecuniary or proprietary interests of Rubio's.

In any event, petitioner's out-of-court statements to Garcia are inadmissible under the new federal rules. Under Rule 804(b)(3), the relevant inquiry is whether the statement is so against penal interests that a reasonable man in the declarant's position would not have made the statement unless he believed it to be true.[7] Hearsay statements are considered sufficiently against the declarant's penal interest when, for example, they constitute an admission of a particular crime, *United States* v. *Marquez*, 462 F. 2d 893, 895 (C.A. 2), make the declarant subject to additional charges or more severe punishment, *United States* v. *Seyfried*, 435 F. 2d 696, 697-698 (C.A. 7), certiorari denied, 402 U.S. 912, or tend to show consciousness of guilt, *Beck* v. *United States*, 140 F. 2d 169, 170 (C.A. D.C.). Petitioner's out-of-court statements are not of this character and are not such that a reasonable man would make them only if he believed them to be true.

Rubio's comment to Garcia that he had "gotten even with [petitioner]" by "set[ting] him up on selling something" to a police officer does not admit anything illegal. Indeed, the statements do not even support petitioner's version of the facts, for they merely describe Rubio's role as an informant. As the court of appeals stated (Pet. App. 27):

> There is no showing that Rubio falsified evidence; nor was it shown that Rubio involved Pena in a drug transaction without Pena's knowledge. Rubio could

[7]The statements could not be admissible, as petitioner suggests (Pet. 11-12), on the ground that they tended to make Rubio "an object of hatred, ridicule or disgrace." The statements did not have that effect, and, moreover, that portion of proposed Rule 804(b)(3) which would have made such statements admissible as declarations against interest was deleted from the final version.

> well have been discharging his proper role as an informant and at the same time intending to use his status to "get even" with one he believed had killed his brother-in-law. It is not a crime for an informant to assist narcotics agents in "setting up" or trapping a drug dealer if the means employed are lawful, even if his motives are not totally faithful to the government. Rubio's personal motives for helping the government "make this case" against Pena, while vengeful, do not tend to subject Rubio to criminal liability.[8].

Rubio's statements therefore were not admissible as declarations against penal interest.[9]

[8]Nor does the statement provide any evidence of obstructing or delaying a criminal investigation, which would be criminal under 18 U.S.C. 1510 (see Pet. 11). Likewise, Rubio's statement that he had gotten the money from petitioner, absent any evidence either of the circumstances in which he received the money or of what he subsequently did with it (see Pet. App. 28), is insufficient to show embezzlement under 18 U.S.C. 641 or fraud under 18 U.S.C. 1003.

[9]Even if Rubio's statements were a declaration against penal interest, they were still properly excluded, since under Fed. R. Evid. 804(b)(3) such declarations are inadmissible "unless corroborating circumstances clearly indicate the trustworthiness of the statement," and here there was insufficient corroboration. Petitioner mentions (Pet. 12, n. 3) a portion of Legarreta's testimony, in which he said that Rubio called the Bureau of Narcotics and Dangerous Drugs and told them he had disclosed his role to petitioner (Tr. 45). But Legarreta's testimony, viewed in its entirety, does not corroborate petitioner's version of these events. Indeed, Legarreta's testimony undercuts the entire premise of petitioner's defense because it shows that petitioner knew he was dealing in drugs and that he was the person who could contact the source of the heroin. The only other allegedly corroborating circumstances, *i.e.*, Rubio's disappearance, and a variance in testimony over whether there was a shelf in the men's room (see Pet. 12, n. 3), do not provide the assurances of reliability which are required under this exception to the hearsay rule. See, *e.g.*, *United States* v. *Goodlow*, 500 F. 2d 954, 958 (C.A. 8); *United States* v. *Harris*, 501 F. 2d 1, 7 (C.A. 9).

b. Nor were Rubio's alleged statements admissible under the rationale of *Chambers* v. *Mississippi, supra.* In *Chambers*, the Court held that, under the circumstances of that case, it was error for the trial court to exclude evidence that someone other than the defendant had confessed on four separate occasions, once under oath, to the crime of which the defendant had been convicted. This limited holding does not apply to and should not be extended to the significantly different facts of the instant case.

The excluded testimony in *Chambers* "bore persuasive assurances of trustworthiness" (410 U.S. at 302) which are lacking here. Each confession was made shortly after the crime to which the confessions related, each was corroborated by other evidence, and each "was in a very real sense self-incriminatory and unquestionably against interest" (410 U.S. at 300-301). Here, the excluded hearsay statement was made some five months after the crime for which petitioner was convicted. There was no other evidence from which it could be inferred that Rubio had done anything other than fulfill his role as informant. His statement to Garcia was ambiguous and so minimally, if at all, against his penal interest that it lacks the guarantee of trustworthiness found to exist in *Chambers.*

Moreover, in *Chambers* the declarant was under oath and available for cross-examination (410 U.S. at 301). Here, because of Rubio's unavailability at the time of trial, there was no means of testing the truthfulness of his extrajudicial statements.

Thus, in contrast to *Chambers*, the trial court's ruling here represented no mechanistic application of the hearsay rule (410 U.S. at 302) resulting in deprivation of petitioner's rights, but rather reflected a proper exclusion of unreliable hearsay testimony.

2. Petitioner also contends (Pet. 17-20) that he was denied his right to a speedy trial. He was indicted on January 26, 1972; his first trial, on June 3, 1974, ended in a mistrial; a second trial, on January 20, 1975, resulted in the convictions.

The court of appeals correctly rejected the speedy-trial claim under the standards of *Barker* v. *Wingo*, 407 U.S. 514, 530, for determining whether a defendant's constitutional right to a speedy trial has been violated.[10] Here, the delay between the original trial and retrial, seven and one-half months, was not inordinate, and was found by the court of appeals not to have been the government's doing (Pet. App. 33).[11] Moreover, petitioner did not assert his right to a speedy trial (or retrial) at any time between his arrest and his second trial.

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[10]One of the grounds on which petitioner asserts (Pet. 19-20) that his right to a speedy retrial was violated is that the period of delay violated a local plan for the prompt disposition of criminal cases. The plan provides that retrial shall commence "not later than ninety days after the order therefor becomes final unless extended." Following a remand for supplemental findings by the district court, the court of appeals found that the acutely congested court docket which prevailed in the district court immediately prior to petitioner's retrial constituted "exceptional circumstances [which] justified an extension of the Plan's time limitations" (Pet. App. 33).

[11]While the period of delay between the date of petitioner's indictment and his second trial was approximately three years, 120 days of the delay was attributable to two continuances granted to petitioner's co-defendant. Petitioner objected to neither continuance and formally consented to the second. The court of appeals found (Pet. App. 34), moreover, that much of this delay, like the delay between the first trial and the retrial, was attributable to the district court's congested docket.

Finally, petitioner has not shown how he was prejudiced by the delay. He suggests (Pet. 9-10, 20) that he was prejudiced by the death, between the dates of his first and second trial, of Ruben Rubio (not related to John Rubio, the D.E.A. informant), who was present at the bar on the night of the heroin transaction. But, as the court of appeals correctly pointed out (Pet. App. 34), this claim rings hollow in light of the fact that Ruben Rubio was not called as a witness at petitioner's first trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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